Yong Siew Choon v Kerajaan Malaysia

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-150 OF 1998
GOPAL SRI RAM, ALAUDDIN AND MOHD GHAZALI JJCA
28 FEBRUARY 2003

Civil Procedure *— Parties — Action against estate of deceased — Commencement of action against estate of deceased before extraction of letters of representation pursuant to O 15 r 6A of the Rules of the High Court 1980 — Failure by plaintiff to observe terms of O 15 r 6A(4) — Whether non-compliance of O 15 r 6A(4) was mere irregularity or breach of substantive law — Whether plaintiff's suit was an illegality and a nullity*

Succession *— Letters of administration — No application taken out — Action against estate of deceased — Commencement of action against estate of deceased before extraction of letters of representation pursuant to O 15 r 6A of the Rules of the High Court 1980 — Failure by plaintiff to observe terms of O 15 r 6A(4) — Whether non-compliance of O 15 r 6A(4) was mere irregularity or breach of substantive law — Whether plaintiff's suit was an illegality and a nullity*

This appeal arose from an action brought by the respondent against the appellant for sums outstanding as income tax. The claim against the appellant was based on a notice of assessment for the year 1989, which was addressed to 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi' (or 'Yong Siew Choon, the representative of the estate of Abdul Hamid bin Tun Azmi'). The appellant was the widow of Abdul Hamid bin Tun Azmi ('the deceased') but was neither the executrix nor the administratrix of the deceased's estate. In fact, no letters of representation were applied for or taken out in respect of the deceased's estate. When the appellant failed to comply with the notice of assessment, the respondent issued a writ in which it cited the appellant again as 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi', meaning that she was being sued as the representative of the deceased's estate.

Held, allowing the appeal:

(1) Prior to the introduction of O 15 r 6A of the Rules of the High Court 1980 ('RHC'), a plaintiff could not commence an action against the estate of the deceased defendant until letters of administration were extracted. Hence, the rule of substantive law was that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation had been extracted. Therefore, O 15 r 6A of the RHC provided a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulated the future prosecution of the action by requiring, in O 15 r 6A(4) of the RHC, certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of O 15 r 6A(4) of the RHC would

A therefore deprive a plaintiff of the beneficial effect of O 15 r 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity (see pp 154H, 157H–158A).

(2) In the instant case, the action was commenced in accordance with the permissive provision in O 15 r 6A(1) of the RHC. But it was prosecuted in defiance of the mandatory provisions of O 15 r 6A(4) which was the only provision that enabled an action to be kept on foot. So, non-compliance with O 15 r 6A(4) of the RHC was not a mere irregularity, it ran counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It followed that the respondent's suit in the present instance was an illegality and therefore a nullity. Accordingly, the order of the High Court was set aside and the plaintiff's action dismissed both in this court and in the court below (see pp 157F–G, 158A–B).

[Bahasa Malaysia summary

Rayuan ini timbul daripada satu tindakan yang dimulakan oleh responden terhadap perayu untuk jumlah yang belum dibayar sebagai cukai pendapatan. Tuntutan terhadap perayu adalah berdasarkan satu notis penilaian bagi tahun 1989, yang dialamatkan kepada 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi' (atau 'Yong Siew Choon, the representative of the estate of Abdul Hamid bin Tun Azmi'). Perayu adalah balu Abdul Hamid bin Tun Azmi ('si mati') tetapi bukan wasi maupun pentadbir harta pusaka si mati. Bahkan, tiada surat perwakilan telah dipohon atau dimulakan berhubung harta pusaka si mati. Apabila perayu gagal untuk mematuhi notis penilaian tersebut, responden telah mengeluarkan satu writ yang memetik perayu sekali lagi sebagai 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi', yang bermakna beliau telah disaman sebagai wakil harta pusaka si mati.

Diputuskan, membenarkan rayuan tersebut:

(1) Sebelum diperkenalkan A 15 k 6A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), seorang plaintif tidak boleh memulakan satu tindakan terhadap harta pusaka si mati sehingga surat-surat perwakilan tersebut dikeluarkan. Justeru itu, peraturan undang-undang substantif adalah bahawa satu tindakan hanya boleh dimulakan dan dikekalkan oleh atau terhadap si mati setelah, dan hanya setelah itu, surat-surat perwakilan tersebut boleh dikeluarkan. Oleh itu, A 15 k 6A KMT memperuntukkan satu pengecualian yang amat terbatas terhadap peraturan substantif tersebut dengan membenarkan permulaan satu tindakan terhadap harta pusaka si mati sebelum pengeluaran surat-surat perwakilan

tersebut. Tetapi ia melaraskan pendakwaan tindakan dengan menghendaki, seperti dalam A 15 k 6A(4) KMT, langkah-langkah tertentu yang perlu diambil berhubung dengannya dan menspesifikasikan masa yang dihadkan untuk mengambil langkah-langkah tersebut. Kegagalan untuk mematuhi terma-terma A 15 k 6A(4) KMT akan menjadikan plaintif terkilan terhadap kesan berfaedah A 15 k 6A dan mengaktifkan prinsip peraturan undang-undang substantif yang mengawal tindakan-tindakan sedemikian sehingga mengakibatkan tindakan yang telah dimulakan itu terbatal (lihat ms 154H, 157H–158A).

(2) Dalam kes semasa, tindakan tersebut telah dimulakan bersesuaian dengan peruntukan yang dibenarkan dalam A 15 k 6A(1) KMT. Tetapi pendakwaan telah dijalankan dengan mengingkari peruntukan mandatori A 15 k 6A(4) yang merupakan satu-satunya peruntukan yang membolehkan satu tindakan dikekalkan. Oleh itu, ketidakpatuhan A 15 k 6A(4) KMT bukan hanya satu luar aturan, ia bercanggah dengan undang-undang substantif, terutamanya, di mana satu tindakan tidak boleh dikekalkan terhadap harta pusaka si mati oleh sebab ketiadaan pengeluaran surat-surat perwakilan. Ia diikuti bahawa guaman responden dalam kes semasa adalah satu kesalahan undang-undang dan oleh itu terbatal. Sewajarnya, perintah Mahkamah Tinggi diketepikan dan tindakan plaintif ditolak di mahkamah ini dan di mahkamah bawahan (lihat ms 157F–G, 158A–B).]

Notes

For cases on action against estate of deceased, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 4151.

For cases on letters of administration, no application taken out, see 11 *Mallal's Digest* (4th Ed, 19961 Reissue) para 4151.

Cases referred to

Balachandran s/o Samy & Anor v Chew Man Chan & Anor [1995] 4 MLJ 685 (refd)

Chay Chong Hwa & Ors v Seah Mary [1987] 1 MLJ 173 (folld)

Chia Foon Sian & Anor v Lam Chew Fah & Anor [1955] MLJ 203 (not folld)

Chinese Tin Mines Rehabilitation Loans Board v Chee Hoi Voon [1958] MLJ 269 (refd)

Lee Lee Cheng v Seow Peng Kwang [1960] MLJ 1 (refd)

Lee Lee Cheng v Seow Peng Kwang [1958] MLJ 271 (refd)

P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors [1961] MLJ 89 (refd)

Ruhani bte Mohat & Anor v Abdul Karim Mat Ali & Anor [1993] 3 CLJ 524 (not folld)

Savena Supramaniam Pillay v Tan Kah Chiat, administrator of Tan Kong Liang, deceased [1934] MLJ 133 (refd)

Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors [1990] 3 MLJ 254 (refd)

Singapore Gems Co v The Personal Representatives for Akber Ali (deceased) [1992] 2 SLR 254 (folld)

Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy [1996] 1 SLR 586 (folld)

Legislation referred to

Civil Law Act 1956 s 8(3)(b)

Rules of the High Court 1980 O 15 r 6A(1), (4), (7)

Rules of the Supreme Court 1957

Appeal from: Civil Appeal No S2–21–34 of 1991 (High Court, Kuala Lumpur)

Jagjit Singh (*Jagjit Singh & Co*) for the appellant.

Abu Tariq bin Jamaluddin (*Ahmad Ishak bin Mohd Hassan* with him) (Inland Revenue Board) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This appeal raises a short but important point of procedure. It arises from an action brought by the respondent against the appellant for sums outstanding as income tax. The respondent's claim was based on a notice of assessment for the year 1989. The relevant notice is addressed to 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi' which on a contextual translation reads 'Yong Siew Choon, the representative of the estate of Abdul Hamid bin Tun Azmi'. It may here be mentioned that the appellant is the widow of Abdul Hamid bin Tun Azmi ('the deceased') but is neither the executrix nor the administratrix of the deceased's estate. Indeed, it is beyond dispute that no letters of representation of any sort were applied for or taken out in respect of the deceased's estate.

When the appellant failed to comply with the notice of assessment, the respondent issued writ in which it cited the appellant again as 'Yong Siew Choon, wakil sah harta pusaka Abdul Hamid bin Tun Azmi', meaning, of course, that she was being sued as the representative of the deceased's estate. It is clear that respondent obviously intended to implead the deceased's estate with a view to recovering the tax from it and not from the appellant personally.

Now, the institution of an action against the estate of a deceased person is governed by O 15 r 6A of the Rules of the High Court 1980 ('the RHC') which reads as follows:

> (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
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> (2) Without prejudice to the generality of para (1), an action brought against 'the personal representatives of A B deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with para (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in para (1) or (3) —

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-para (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under para (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under para (4) appointing the Official Administrator to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

(6) Where an order is made under para (4), rr 7(4) and 8(3) and (4) shall apply as if the order had been made under r 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings.

We consider it useful to have regard to the previous position in order to properly appreciate the purpose and scope of r 6A of O 15. Prior to the introduction of the RHC, the governing procedural law was housed within the Rules of the Supreme Court 1957 which contained no provision similar to O 15 r 6A of the RHC. A plaintiff could not therefore commence an action against the estate of a deceased defendant until letters of representation were extracted.

In *P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* [1961] MLJ 89, the plaintiff sued the first and second defendants as administratrix and

A administrator respectively of the estate of one Goh Tiong Tan, deceased, inter alia, for damages for breach of contract. The defendants took the point that they had not been constituted the legal representatives of the deceased and could not be sued in that capacity so that the plaintiffs' action was incompetent and ought to be dismissed *in limine*. Ismail Khan J (as he then was) when dismissing the action said:

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> I respectfully follow Lord Parker's observations in the case of *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 at p 609 ... 'An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant'; in my opinion, this also applies in the reverse. The representative capacity can only be proved by the production of the grant under seal or a certified copy thereof.
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> In my opinion, it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate. I am fortified in this view by the judgment of Scott LJ in *Ingall v Moran* [1944] KB 160; [1944] 1 All ER 97 at p 164. In that case the plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act 1934. He purported to sue in a representative capacity as administrator of his son's estate. The writ was issued in September 1942, but the grant of letters of administration was not taken out until November. Scott LJ in his judgment observed that 'at the time writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ ... The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out.' It was held in that case that as no letters of administration were taken out at the date of the writ, the writ was a nullity from the beginning and that the subsequent grant of letters of administration did not operate retrospectively so as to validate the action.

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While on the topic, we note that Whitton J in *Chia Foon Sian & Anor v Lam Chew Fah & Anor* [1955] MLJ 203 held that it is the order of the registrar granting letters of administration and not their extraction that confers authority upon an administrator. A similar view was expressed in the case of *Ruhani bte Mohat & Anor v Abdul Karim Mat Ali & Anor* [1993] 3 CLJ 524. However, as may be seen, Ismail Khan J in *P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* declined to follow Whitton J's view. The courts of Singapore have preferred *Govindasamy Pillay* to that of *Chia Foon Sian*.

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In *Singapore Gems Co v The Personal Representatives for Akber Ali (deceased)* [1992] 2 SLR 254, Chao Hick Tin J (now a judge of the Court of Appeal) whose views are entitled to much respect held that:

> While the Malaysian authorities are not binding on me and are only of persuasive authority, I accepted the reasoning of Ismail Khan J in *Govindasamy Pillay*, that an administrator has not clothed himself with that status until he has extracted the grant. It seemed clear to me that what was stated by Whitton J in *Chia Foon Sian*, was just obiter, as the real issue in that case concerned the validation of payments made to an executor de son tort who later was appointed administrator.

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In *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 1 SLR 586, Judith Prakash J agreed with the judgment of Chao Hick Tin J in *Singapore Gems Co.* Her Honour also referred to the Privy Council decision in *Chay Chong Hwa & Ors v Seah Mary* [1987] 1 MLJ 173. The advice of Lord Oliver of Aylmerton in that case, when properly interpreted, makes it amply clear that Ismail Khan J's decision in *Govindasamy Pillay* is correct and that any contrary view is erroneous. Decisions that express such contrary view are in our judgment wrongly decided and ought not to be followed.

Now the result of the law as expressed in *Govindasamy Pillay* though accurate, often produced much injustice, especially in road accident cases because of s 8(3)(b) of the Civil Law Act 1956 which provides:

> No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action ...
> ...
> (b) are taken not later than six months after his personal representative took out representation.

The point we seek to make is well illustrated by *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1. In that case, a passenger in a motor car which was being driven by one Loke collided with a motor lorry. Both men were killed. The passenger's widow brought an action against the administrator of the estate of Loke more than six months after the letters of administration were extracted. It was held (by Syed Sheh Barakhbah J in *Lee Lee Cheng v Seow Peng Kwang* [1958] MLJ 271 and the Court of Appeal) that the action was time barred and that the court had no power to extend time. We would observe that had there been a rule of court in terms of O 15 r 6A of the RHC, the plaintiff in that case could have commenced her action well within the time limited by statute.

Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O 15 r 6A of the RHC) to commence the action in the manner intituled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O 15 r 6A(4) of the RHC.

It is our judgment that while O 15 r 6A of the RHC is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it *must* comply with its terms before he or she may take advantage of any provision of substantive law (see *Balachandran s/o Samy & Anor v Chew Man Chan & Anor* [1995] 4 MLJ 685, per Vincent Ng J and *Singapore Gems Co v The Personal Representatives for Akber Ali (deceased)*). Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O 15 r 6A(7) of the RHC makes it abundantly clear that if the terms of O 15 r 6A of the RHC are complied with then an order or a judgment obtained in the action shall bind the estate

of a deceased person. Conversely, therefore, if the provisions of O 15 r 6A of the RHC are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased.

It is also important to bear in mind that the judgment that is extracted in an action against the estate of a deceased defendant must, if it is to be capable of being executed against the assets of the estate be in the form *de bonis testatoris*. If it is merely in the form *de bonis propriis*, then it cannot be executed against the assets of the deceased's estate.

In *Savena Supramaniam Pillay v Tan Kah Chiat, administrator of Tan Kong Liang, deceased* [1934] MLJ 133, the headnote reports that the court held that 'when an action is brought against an administrator and judgment is entered against the defendant simpliciter, this is a judgment *de bonis propriis* and does not entitle the judgment creditor to obtain satisfaction out of the assets of the deceased'. That case was followed by Syed Sheh Barakbah J (later Lord President) in *Chinese Tin Mines Rehabilitation Loans Board v Chee Hoi Voon* [1958] MLJ 269 and both these cases were followed and applied by Gunn Chit Tuan J (later Chief Justice of Malaya) in *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254. All these cases concerned judgments in default, either of appearance or of defence. But we do not see that that makes any difference to the cardinal principle, namely, that it is only a judgment *de bonis testatoris* that will bind the estate of a deceased. We may also add that in *Chinese Tin Mines Rehabilitation Loans Board v Chee Hoi Voon* it was held that (to quote the headnote to the report of that case): 'judgment having been obtained against an administrator of an estate *de bonis propriis* on a loan made to him in his representative capacity, a second action does not lie against him in his personal capacity for the balance due on the unsatisfied judgment or on the former cause of action. The previous judgment is still outstanding and the proper remedy is to execute the judgment.'

In the present case, the action was commenced in accordance with the permissive provision in O 15 r 6A(1) of the RHC. But it was prosecuted in defiance of the mandatory provisions of O 15 r 6A(4) of the RHC which is the only provision that enables an action to be kept on foot. So, non-compliance of O 15 r 6A(4) of the RHC is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity.

To summarize, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and *only* after, letters of representation have been extracted. Order 15 r 6A of the RHC provides a very limited exception to that substantive rule by permitting the *commencement* of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r 6A(4)) certain steps to be taken in that respect and specifying the time limited for taking such steps. Failure to observe the terms of r 6A(4) of O 15 will therefore deprive a

plaintiff of the beneficial effect of r 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. As already stated in the preceding paragraph of this judgment that is what happened in the present case.

The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this court and in the court below. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Lim Lee Na